No. 85-1322

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JEROME LIGHTMAN AND LIGHTMAN DRUM COMPANY, INC.,

Petitioners,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT

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QUESTIONS PRESENTED

1. Does a state violate the Equal Protection Clause and Privileges and Immunities Clause of the United States Constitution when it provides that its statute of limitations for criminal prosecutions is totally and permanently suspended for out-of-state residents without regard to the facts that the whereabouts of such persons is known and that they can easily be apprehended and brought to trial?

2. Where a state has totally deprived a criminal defendant of the benefit of its statute of limitations because he resides out-of-state, and the time between the alleged crime and commencement of prosecution is over twice as long as the limitations period provided by statute, is it a violation of the Due Process Clause to impose on the defendant the burden of proving actual prejudice as a result of the delay and that the prosecutor intentionally caused the delay in order to gain an advantage?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA DISTRICT

Jerome Lightman and Lightman Drum Company, Inc., by and through their attorney, Herbert L. Ocks, Esquire, hereby petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania, Philadelphia District.

OPINIONS BELOW

The Supreme Court of Pennsylvania denied petitioner's petition for review of the judgment of the Pennsylvania Superior Court by order dated December 9, 1985, without any opinion being issued. As yet there is no official or unofficial published report of this order.

The Pennsylvania Superior Court affirmed the convictions of these petitioners by opinion and judgment dated January 30, 1985, and reported officially at 339 Pa. Super. 359 and unofficially at 489 A. 2d 200.

Petitioners' application for reargument was denied by the Superior Court without opinion and this denial of reargument was noted at 489 A.2d 200.

Petitioners' convictions in the Common Pleas Court of Philadelphia County, Pennsylvania, were followed by the issuance of an opinion by the trial judge, the Honorable Curtis C. Carson, Jr., on November 18, 1981. Petitioners' pretrial motion to quash information was denied by the Honorable Abraham Gafni of the Philadelphia County Court of Common Pleas, who on December 21, 1981, filed an opinion in support of his decision. Neither of these opinions has been reported.

Copies of all of the above opinions and orders are set forth in the Appendix to this petition.

STATEMENT OF JURISDICTION

This petition is for a writ of certiorari to the Superior Court of Pennsylvania, Philadelphia District for review of a judgment dated January 30, 1985. No petition for rehearing was filed.

Jurisdiction to review the judgment in question is conferred by 28 U.S.C. §1257(3), this being a case in which the validity of a state statute is challenged on the ground of its being repugnant to the Constitution of the United States, and a right, privilege or immunity is being claimed under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1, Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 Pa. C.S.A. §108 [now set forth at 42 Pa. C.S.A. §5554]. Time limitations.

> (a) Murder—A prosecution for murder of the first degree or of the second degree may be commenced at any time.
>
> (b) Other offenses.—Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

(1) A prosecution for any of the following offenses under this code must be commenced within five years after it is committed:

Section 3123 (relating to involuntary deviate sexual intercourse)
Section 3301 (relating to arson and related offenses)
Section 3502 (relating to burglary)
Section 3701 (relating to robbery)
Section 4101 (relating to forgery)
Section 4902 (relating to perjury)

(2) A prosecution for any other offense under this code must be commenced within two years after it is committed.

(c) Exceptions.—If the period prescribed in subsection (b) of this section has expired, a prosecution may nevertheless be commenced for:

(1) Any offense a material element of which is either fraud or a breach of fiduciary obligation within one year after discovery of the offense by an aggrieved party or by a person who has legal duty to represent an aggrieved party and who is himself not a party to the offense, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.

(2) Any offense committed by a public officer or employe in the course of or in connection with his office or employment at

any time when the defendant is in public office or employment or within two years thereafter, but in no case shall this paragraph extend the period of limitation otherwise applicable by more than three years.

(d) Commission of offense.—An offense is committed either when every element occurs, or, if a legislative prupose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the complicity of the defendant therein is terminated. Time starts to run on the day after the offense is committed.

(e) Commencement of prosecution.—A prosecution is commenced either when an indictment is found or when a warrant or summons is issued, if such warrant or summons is executed without reasonable delay.

(f) Tolling of statute.—The period of limitation does not run:

(1) during any time when the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth; or

(2) during any time when a prosecution against the accused for the same conduct is pending in this Commonwealth.

STATEMENT OF THE CASE

A. Procedural History

Petitioners Jerome Lightman and Lightman Drum Company were each convicted of bribery and conspiracy in the Court of Common Pleas of Philadelphia County, Pennsylvania. Prosecution of these petitioners commenced on March 28, 1980, with the issuance of the findings, order and presentment of the County Investigating Grand Jury. That same day, Jerome Lightman was arrested and criminal complaints were issued against both petitioners. Informations were filed on April 14, 1980.

Following the denial of petitioners' motion to quash informations by the Honorable Abraham Gafni of the Court of Common Pleas, petitioners were tried before the Honorable Curtis C. Carson, Jr., and a jury, and a guilty verdict was returned on March 23, 1981. Both petitioners appealed to the Pennsylvania Superior Court, which affirmed their convictions in an opinion and order dated January 30, 1985. Pursuant to its discretionary powers, the Pennsylvania Supreme Court denied the petition for allowance of appeal without issuing any opinion on December 9, 1985. This petition for a writ of certiorari followed.

B. Statement of Facts

The criminal charges against these petitioners arose out of activities which occurred between May 1972 and December 1975. During this time, Lightman Drum Company was in the business of transporting and disposing of liquid industrial wastes. At the time, petitioner Jerome Lightman was an officer of Lightman Drum Company and a minority shareholder. His father, Marvin Lightman, was the president and majority shareholder, but died in September of 1978, after the date of the last offense charged but prior to commencement of any criminal prosecution.

The allegations against the petitioners were that from May 1972 until December 1975, they had bribed two employees of the City of Philadelphia to allow Lightman Drum Company trucks to enter land owned by the City and to dump 55 gallon drums of liquid industrial waste on the premises. The primary defense advanced at trial by petitioner Jerome Lightman was that at the time alleged, the entire conduct of the business was in the hands of his father, Marvin Lightman, that payment of bribes to City employees had been arranged by Marvin Lightman and that at no time did Jerome Lightman possess the criminal knowledge or intent required to convict him of the crimes of bribery and conspiracy.

As of April 1974, Lightman Drum Company had its only office in Berlin, New Jersey, which is approximately ten miles outside Philadelphia. Jerome Lightman worked there, and resided in Cherry Hill, New Jersey, about five miles from Philadelphia. He had no other office or residence in Pennsylvania.

The statute of limitations applicable to this case was 18 Pa. C.S.A. §108. This section has since been repealed but substantially identical provisions were immediately reenacted, are presently in effect within the Commonwealth of Pennsylvania and are contained at 42 Pa. C.S.A. §5551, *et seq.*

It was undisputed throughout the proceedings in the lower court that the applicable statute of limitations was two years for the offenses charged. The last offense was alleged to have occurred in December 1975 and thus prosecution would have been time-barred except for the tolling provision contained in 18 Pa. C.S.A. §108(f)(1), which reads as follows:

> "(f) Tolling of statute—The period of limitation does not run: (1) during any time when the accused is continuously absent from this Commonwealth

> or has no reasonably ascertainable place of abode or work within this Commonwealth;"

In their pretrial motion to quash informations, petitioners challenged the above tolling provision on the ground that it violated both the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment by arbitrarily and irrationally discriminating against out-of-state residents. Petitioners also advanced the separate and independent argument that the delay of four years and three months between the last offense and the commencement of prosecution was caused solely by the District Attorney and had substantially prejudiced them in the defense of their case. Petitioners sought to prove that under these circumstances, this delay constituted a violation of their right to due process.

The Court of Common Pleas rejected both these arguments and held that the mere fact of petitioners' out-of-state residency, in and of itself, was sufficient to toll the running of the statute of limitations. With respect to petitioners' equal protection challenge, the court found that the classification contained in 18 Pa. C.S.A. §108(f), which differentiates between residents and non-residents, did not involve a suspect classification or fundamental rights which would necessitate the "compelling state interest" test, and that under the "rational relationship" test, the classification had a rational relationship to the purpose of the legislation and thus satisfied the requirements of the Equal Protection Clause.

The Common Pleas Court rejected petitioners' privileges and immunities argument because it found that the privilege at issue, namely, protection from prosecution for a crime after a specified time period, did not bear upon the vitality of the nation as a single entity.

Finally, the court held that there had been no denial of due process because the pre-arrest delay did not actually and substantially prejudice the petitioners, and the Commonwealth did not delay prosecution solely to gain a tactical advantage over the petitioners. All of the above conclusions of law are to be found in Judge Gafni's opinion dated December 21, 1981, and included in the appendix herein.

The applicability of the statute of limitations and the issue of pre-arrest delay were not before the jury for consideration, and the jury made no findings of fact regarding these matters. Petitioners renewed their argument on these points in a post verdict motion before the trial judge and in their appeal to the Pennsylvania Superior Court. The opinions of the trial judge and of the Superior Court affirmed Judge Gafni's rulings on these issues, based on exactly the same reasoning as was presented by Judge Gafni. As noted above, the Supreme Court of Pennsylvania denied the petition for allowance of appeal and no briefs on the merits were ever filed with that court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE PENNSYLVANIA COURTS ERRED IN HOLDING THAT THE RESIDENCY CLASSIFICATION OF THE PENNSYLVANIA CRIMINAL STATUTE OF LIMITATIONS DOES NOT VIOLATE EQUAL PROTECTION.

The instant petition for writ of certiorari should be granted because a state court of last resort has decided a federal question in a way which is in conflict with applicable decisions of this Court. The Pennsylvania Supreme Court has allowed to stand a construction of a state statute which permanently denies each and every non-resident of Pennsylvania the benefit of that state's

statute of limitations solely and exclusively because of non-residency status. This interpretation directly conflicts with the fundamental principles announced by this Court in *United States v. Marion,* 404 U.S. 307 (1971).

Since at least 1968, this Court has indicated that criminal statutes of limitations are to be liberally construed in favor of repose. *United States v. Habig,* 390 U.S. 222 (1968).

The primary purposes inherent in all criminal statutes of limitations were concisely stated in *Toussie v. United States,* 397 U.S. 112 (1970):

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." 397 U.S. 112 at 114-115.

The landmark decision of *United States v. Marion, supra,* provided a thorough analysis of criminal statutes of limitations and set forth the bedrock principles which must govern the present case. First, that the statute of limitations is the *primary* mechanism which the law provides to guard against the bringing of overly stale criminal charges. Second, that it is the statute of limitations alone which protects against *potential* as distinguished from *actual*

prejudice to an accused's ability to defend himself as the result of passage of time between the crime and the bringing of criminal charges. Indeed, commencing with *United States v. Lovasco,* 431 U.S. 783 (1977), a continuing line of federal cases has reiterated the rule that "proof of prejudice is a necessary condition for a due process claim stemming from pre-arrest delay and that to succeed with such a claim an accused must prove he has suffered actual and material prejudice." *United States v. Lovasco, supra; United States v. Mays,* 549 F.2d 670 (9th Cir., 1977); *United States v. Sands,* 541 F.2d 1370 (10th Cir., 1977).

Finally and most importantly, *Marion* characterized the essence of a criminal statute of limitations as follows:

> "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." 404 U.S. 307 at 321.

In the present case, the Pennsyslvania Superior Court has adopted, and the Pennsylvania Supreme Court has allowed to stand, an interpretation of a Pennsylvania statute which vitiates completely every one of the above principles. Incredibly, the Pennsylvania courts have construed the tolling provision contained in 18 Pa. C.S.A. §108(f) in a fashion which permanently and unconditionally suspends the running of the criminal statute of limitations in all cases where the defendant is an out-of-state resident. This interpretation violates the Equal Protection Clause of the United States Constitution because it discriminates exclusively on the basis of a defendant's place of residence, because it affects fundamental constitutional rights and because it is not justified by any compelling state interest nor is it rationally related to the legitimate purposes of the statute.

The pertinent part of 18 Pa. C.S.A. §108(f) reads as follows:

> "(f) Tolling of statute—the period of limitation does not run: (1) during any time when the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth; . . ."

This statute creates two classes to whom disparate treatment is afforded: (1) residents for whom a definite period of limitation is always applicable (since by definition a resident has an ascertainable abode in Pennsylvania); and (2) residents who are continuously absent from the Commonwealth and non-residents, for whom the time limitation is suspended.

It is clear from the plain language of this section as well as from the interpretation given by the court in this case that non-residency, per se, is sufficient to toll the statute of limitations. Once it is established that an accused has no place of abode or work within the Commonwealth, he is deprived of all of the protections of the statute of limitations.

The constitutional right most obviously infringed by this classification is the right of free interstate travel. *Shapiro v. Thompson*, 394 U.S. 618 (1969). But a far more immediate and crucial deprivation of rights also occurs because the statute of limitations is the primary guarantee against potential prejudice to a criminal defendant resulting from the passage of time as was clearly recognized in *United States v. Marion, supra.* Indeed, given the difficult burden placed on a defendant under existing law of proving actual prejudice from pre-arrest delay, it is accurate to say that the state statute of limitations provides the only protection realistically available.

The truly drastic effect of 18 Pa. C.S.A. §108(f) is that for a significant class of persons the supposedly irrebuttable presumption that a defendant's right to a fair trial is prejudiced

by a delay of a certain length is entirely dispensed with. Under the Pennsylvania court's ruling, a non-resident could be prosecuted in Pennsylvania for a crime committed twenty or even fifty years in the past. This class of persons is utterly without any of the benefits afforded by the statute of limitations to Pennsylvania residents.

The irrationality of the statutory classification becomes clear when one considers that there was abundant evidence in this case that the petitioners had in no way concealed their whereabouts. Jerome Lightman lived and worked within ten miles of the Pennsylvania state line. The names and addresses of Jerome Lightman and Lightman Drum Company were continuously listed in the telephone directory. In addition, Judge Gafni specifically found that Lightman Drum Company had hazardous waste haulers permits and fuel stickers from the Commonwealth of Pennsylvania. Thus the Commonwealth had official records of the address of this petitioner at all times. Both petitioners could have been located, charged, apprehended and brought to trial with no more difficulty than is involved in prosecuting a Pennsylvania resident. Neither did the non-residence of either petitioner frustrate detection of the crimes. The evidence showed that even minimal investigation by the District Attorney would have promptly uncovered all of the relevant facts. Yet it is obvious from the opinions of the Pennsylvania Superior and Common Pleas Courts that none of this evidence was considered relevant because the simple fact of petitioners' New Jersey residence was all that was needed to toll the running of the limitations period.

The critical point is that the different treatment accorded residents and non-residents bears no rational relationship to the goal of the legislation. This goal is to extend the limitations period when detection of a crime and apprehension of a suspect is frustrated by his unknown whereabouts or distance from the Commonwealth. The Superior Court has cited *Scherling v. Superior Court of Santa Clara County,* 585 P.2d 219 (1978), to

support the holding that the classification contained in 18 Pa. C.S.A. §108(f) is rational. But *Scherling* is readily distinguishable from the present case because the defendant there removed himself from the jurisdiction to a place almost a thousand miles away to avoid prosecution. Is it rational to compare that case with this and hold that the statute of limitations would not have been tolled if these petitioners resided in Pittsburgh, some three hundred miles from Philadelphia, but is tolled because they lived and did business in New Jersey even though they remained at all times within the same community where the crimes were committed? What the legislature has done is to create a litmus test for tolling the statute of limitations which is based entirely on state lines which may divide the relevant community in which the accused lives and works which community is more fairly treated as a complete unit. The arbitrariness and artificiality of this scheme is clear.

The rationality of a remarkably similar tolling provision in New Jersey's statute of limitations for civil cases was sharply questioned by Justice Stevens in a recent dissent in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). What most concerned Justice Stevens was that the statute of limitations was not merely lengthened for a definite period of time for out-of-state corporations, but was entirely suspended for as long as such a corporation had no designated agent within the jurisdiction:

> "The equal protection question in this case is novel. I agree with the Court that there is a rational basis for treating unregistered foreign corporations differently from registered corporations because they are somewhat more difficult to locate and to serve with process. Thus, a provision that merely gave plaintiffs a fair opportunity to overcome these difficulties—for example, a longer period of limitations for suits against such corporations, or a tolling provision limited to corporations that had

> not filed their current address with the Secretary of State—would unquestionably be permissible. But does it follow that it is also rational to deny such corporations the benefit of any statute of limitations? Because there is a rational basis for *some* differential treatment, does it automatically follow that *any* differential treatment is constitutionally permissible? I think not . . ." 455 U.S. 404 at 420. [Emphasis in original.]

The analogy to the statute under consideration is too clear to require extended discussion. Suffice it to say that the potential prejudice from passage of time for a criminal defendant is likely more serious than in a civil suit because the consequences of conviction are graver and also because evidence is often more easily lost. The need for a definite limitations period is correspondingly greater. Lastly, it must be noted that unlike *Searle, supra,* there is no laches defense to a criminal prosecution in Pennsylvania.

The Equal Protection Clause of the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways. It does, however, deny the power to legislate that different treatment be afforded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objectives of the statute. *Reed v. Reed,* 404 U.S. 71 (1971). A classification must be reasonable, not arbitrary, and must rest on some distinction having a fair and substantial relationship to the object of the legislation, so that all persons similarly situated shall be treated alike. *Eisenstadt v. Baird,* 405 U.S. 438 (1972). Here, petitioners' non-residence has no connection with the failure of the District Attorney to pursue the investigation or discovery of the crime within the statutory period. Nor did Jerome Lightman's non-residence contribute to the failure of the Commonwealth to secure jurisdiction over him, since his

whereabouts were easily ascertainable. The Commonwealth has at its disposal the means of acquiring jurisdiction over non-resident defendants. Rules 224 and 231 of the Pennsylvania Rules of Criminal Procedure permit an indictment or information to be returned against a non-resident defendant without the necessity of a preliminary hearing. Alternatively, the Commonwealth can institute appropriate proceedings to extradite the defendant from another state. *See* 42 Pa. C.S.A. §9121, *et seq.*

In *Hicklin v. Orbeck,* 437 U.S. 518 (1978), this Court, in discussing classifications which were challenged under the Privileges and Immunities Clause, stated:

> ". . .although the Privileges and Immunities Clause 'does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it', id., at 396, 92 L Ed. 1460, 68 S. Ct. 1156, '(i)t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States' Ibid. A 'substantial reason for the discrimination' would not exist, the Court explained, 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the (discriminatory) statute is aimed.' " 437 U.S. at 526.

The fact that petitioners continuously lived and conducted business within the Philadelphia metropolitan region underscores the close relationship one state may have with citizens of another state. This relationship certainly affects the "vitality of a nation as a single entity". *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978). But the Pennsylvania legislature and courts do not base the tolling of the statute of limitations

on the logical considerations of whether a defendant can be located, apprehended and brought to trial. Neither have they chosen the reasonable alternative of extending the limitations period for a definite but longer time period than applies to persons living within the state. Rather, the choice has been made to eliminate entirely for out-of-state residents all of the protections afforded by a criminal statute of limitations. It is this permanent deprivation of rights based on residence alone which violates fundamental constitutional principles, and for this reason, a writ of certiorari should be granted petitioners.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION OF WHEN A PRE-ARREST DELAY IN PROSECUTION VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS WHERE THAT DEFENDANT HAS BEEN DEPRIVED OF THE PROTECTION OF THE APPLICABLE STATUTE OF LIMITATIONS.

An additional reason why this Court should grant the instant petition is because the Pennsylvania courts have decided an important question of federal law which has not been, but should be, settled by this Court. Specifically, this Court has not addressed the question of whether the test for proving a violation of due process as a result of pre-arrest delay is the same for a criminal defendant who has been deprived of the protection of the statute of limitations as it is where prosecution, although delayed, does commence within the limitations period set by the legislature.

The two leading Supreme Court decisions on the parameters of due process in the context of pre-arrest delay, *United States v. Lovasco, supra,* and *United States v. Marion, supra,* reached the conclusion that in the absence of a showing of actual prejudice and intentional prosecutorial delay a criminal defendant has not

established a violation of due process as a result of pre-arrest delay. It is beyond dispute that in reaching this conclusion, both of these cases rely heavily on the availability of the statute of limitations as a defense. But in the present case, because of the circumstances discussed in Point I above, the protection of the statute of limitations was denied to these petitioners. And it must again be emphasized that these prosecutions were begun after a lapse of time of over twice the length of the statute of limitations for the crimes alleged.

Once the statute of limitations defense had been denied them, a denial which we submit was itself unconstitutional, these petitioners were left in the position of having to meet an extremely heavy burden in order to prove their contention that their right to due process had been violated by the delay. And it is demonstrably clear from the cases which have followed *United States v. Lovasco, supra,* that this burden is well nigh impossible for a criminal defendant to meet under existing law.

The present rule is that an accused must make a prima facie showing that the delay in charging him has actually prejudiced his ability to defend the case and that this delay was intentionally or purposely designed and pursued by the prosecution to gain some tactical advantage over him. Only then does the burden shift to the prosecution to explain the delay. *United States v. Comosona,* 614 F.2d 695 (10th Cir., 1980).

The pre-arrest delay which occurred in the present case caused the petitioners actual and substantial prejudice in presenting their defense. In this respect, this case differs sharply from cases in which the pre-arrest delay caused only non-specific and speculative prejudice. There can be no dispute that the testimony of Marvin Lightman, had he been available at trial, would have been a critical element in the defense of this case. As noted above, Marvin Lightman was the father of Jerome Lightman and at the time

of the alleged criminal conduct he was totally in control of Lightman Drum Company. The evidence presented by the prosecution's own witnesses at trial proved that it was Marvin Lightman and not Jerome Lightman who initiated the criminal scheme.

Despite abundant evidence linking the petitioners to the alleged crimes, the Commonwealth did not even commence an investigation until after the limitations period expired. In the interim, Marvin Lightman died and at that point the defense was irreparably prejudiced.

Thus the petitioners faced all of the obstacles which the statute of limitations was intended to guard against, namely, disappearance of witnesses, loss of evidence and fading of memories. Obviously, petitioners cannot specify in detail what Marvin Lightman's testimony would have been had he lived. There are no pleadings, affidavits or transcripts containing statements by Marvin Lightman pertaining to the issues of this case for the simple reason that no litigation, either civil or criminal, was pending at the time he died. Nevertheless, the evidence which was presented in this case compels the conclusion that Marvin Lightman's testimony would have been a crucial factor for the jury to consider in determining the extent of Jerome Lightman's knowledge of and involvement in the criminal scheme initiated by his father. Thus the facts of this case strongly corroborate the irrebuttable presumption announced in *United States v. Marion* that the passage of time equal to the limitations period does cause potential prejudice to an accused.

Under these circumstances, petitioners submit that the traditional burden imposed on a defendant to establish a due process violation because of pre-arrest delay should not be applied. We submit, first, that a showing of potential prejudice through the loss of an obviously material witness should be sufficient to

shift to the prosecution the burden of countering the evidence of prejudice and to explain the pre-arrest delay. Secondly, we submit that where the delay is over twice as long as the limitations period, it is unjust in the extreme to put the defendant to the task of proving that this delay was intentionally caused by the prosecution in order to obtain an advantage over him. *United States v. Lavasco, supra,* itself suggests a fairer standard:

> "In *Marion* we noted with approval that the Government conceded that a 'tactical' delay would violate the Due Process Clause. The Government renews that concession here, Brief for United States 32, and expands it somewhat by stating: 'A Due Process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that the delay would impair the ability to mount an effective defense'. Id., at 32-33, n.25. As the Government notes, however, there is no evidence of recklessness here." *United States v. Lavasco,* 431 U.S. at 795, n.17.

Thus there appears to be a variety of ways in which the existing rule could be modified to afford more realistic due process protection against the grave dangers caused by pre-arrest delay for a defendant who was been deprived of the protection of the statute of limitations. If the Due Process Clause is to have any meaning at all in this context, as both *Marion* and *Lavasco* state that it does, then this Court should take this opportunity to carefully review the existing case law on the subject.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that a writ of certiorari issue to the Superior Court of Pennsylvania to review the decision of that court.

Respectfully submitted,

HERBERT L. OCKS
BLOOM, OCKS & FISHER
Attorneys for Petitioners

APPENDIX A—DENIAL OF PETITION DATED DECEMBER 10, 1985

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

December 10, 1985

Herman Bloom, Esquire
BLOOM, OCKS and FISHER
113 South 21st Street
Philadelphia, PA 19103

RE: Commonwealth of Pennsylvania v. Jerome Lightman, Petitioner
Commonwealth of Pennsylvania v. Lightman Drum Company, Inc., Petitioner
NO. 529 E.D. ALLOCATUR DOCKET 1985

Dear Mr. Bloom:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"December 9, 1985.

Petition Denied.

Per curiam."

Very truly yours,

s/ Patrick Tassos
Deputy Prothonotary

/mz
cc: Robert B. Lawler, Esquire

APPENDIX B—DENIAL OF APPLICATION FOR REARGUMENT DATED APRIL 4, 1985

THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

April 4, 1985

Herman Bloom, Esq.
113 S. 21st St.
Phila., Pa. 19103

Re: Commonwealth v. Jerome Lightman,
Appellant
No. 1026 Philadelphia 1982
Commonwealth v. Lightman Drum Co., Inc.
No. 1027 Philadelphia 1982

Dear Mr. Bloom:

This is to advise that the following Order has been entered in the above-captioned matter:

"AND NOW, April 4, 1985, appellant's application for reargument is denied.

s/ Per Curiam"

Very truly yours,

s/ J. Haniel Henry
J. Haniel Henry
PROTHONOTARY

JHH/gfm

Appendix B

cc: Jane C. Greenspan, Esq.
Asst. Dist. Atty.
cc: Prothonotary - Supreme Court
cc: President Judge - Superior Court
cc: Court Recorder - Superior - Superior Court (J-No. 56059/84
cc: Ms. Donna Bergsgaard - West Publishing

APPENDIX C—JUDGMENT AND OPINION DATED JANUARY 30, 1985

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1026 Philadelphia 1982

COMMONWEALTH OF PENNSYLVANIA

v.

JEROME LIGHTMAN,

Appellant

Appeal from the Judgment of Sentence of March 26, 1982, in the Court of Common Pleas of Philadelphia County, Criminal, No. 747-783 April Term 1980.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1027 Philadelphia 1982

COMMONWEALTH OF PENNSYLVANIA

v.

LIGHTMAN DRUM COMPANY, INC.,

Appellant

Appeal from the Judgment of Sentence of March 26, 1982, in the Court of Common Pleas of Philadelphia County, Criminal, No. 784-820 April Term 1980.

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J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

By The Court:

s/ J. Haniel Henry
J. Haniel Henry
PROTHONOTARY

Dated: January 30, 1985

Appendix C

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1026 Philadelphia 1982

COMMONWEALTH OF PENNSYLVANIA

v.

JEROME LIGHTMAN,

Appellant

Appeal from the Judgment of Sentence of March 26, 1982, in the Court of Common Pleas of Philadelphia County, Criminal, No. 747-783 April Term 1980.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1027 Philadelphia 1982

COMMONWEALTH OF PENNSYLVANIA

v.

LIGHTMAN DRUM COMPANY, INC.,

Appellant

Appeal from the Judgment of Sentence of March 26, 1982, in the Court of Common Pleas of Philadelphia County, Criminal, No. 784-820 April Term 1980.

BEFORE: SPAETH, P.J., OLSZEWSKI and BECK, JJ.

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OPINION BY OLSZEWSKI, J.:

Appellants are a private, family-owned and run waste disposal company and its vice president (who owned 40% of its stock). At trial it was alleged that in 1972 Clarence Walker, a Streets Department bulldozer operator assigned to Philadelphia's Fort Mifflin Landfill, entered into an agreement with Marvin Lightman (father of Jerome Lightman), president and principal stockholder of Lightman Drum Company. Under the agreement, Walker would permit Lightman trucks to enter the landfill to dump toxic wastes, in return for a fixed amount of money per barrel. From 1972 until 1975, Lightman trucks regularly entered the landfill to dump drums, paying to Walker and his co-worker, Curtis Carson, at least $12,000 by checks signed and issued by Marvin or Jerome Lightman. The landfill was intended to be a disposal site for sterile fly-ash residue from the city incinerator, brought here by city vehicles or privately owned vehicles under contract with the City.

The findings of fact by Judge Gafni, below, show that the Pennsylvania Department of Environmental Resources and the City's Streets Department became aware of illegal dumping activity at the landfill in December 1975, when an unidentified truck was caught dumping at the site. However, the District Attorney's Office first became aware of the bribery and conspiracy charged in this case on February 28, 1979. On that date Carson confessed to a police detective that he had received money as bribes from Jerome Lightman and several other chemical waste disposal companies. An investigation into Lightman's complicity in the illegal dumping commenced at that time. The investigation was hampered by Jerome Lightman's non-residency status and by Lightman Drum's having no office in the Commonwealth from December, 1975 through March, 1980.

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Jerome Lightman was arrested, and criminal complaints were filed against Lightman Drum and Jerome Lightman on March 28, 1980. After trial by jury, Jerome Lightman was convicted of 31 counts of bribery and also conspiracy. 18 Pa. C.S.A. § 4701; 18 Pa. C.S.A. § 903. Lightman Drum Company was convicted of 34 counts of bribery and also conspiracy. Jerome Lightman was sentenced to 1½ to 4 years imprisonment plus a fine of $3,000.00 on each bill, with each sentence to run concurrently. Lightman Drum Company received a suspended sentence.

The costs for clean-up of the Fort Mifflin Landfill are anticipated to run into the millons of dollars. No evidence has been presented concerning the impact of the toxic wastes on the environment or public health. This appeal follows the denial of timely motions in arrest of judgment and for a new trial.

Appellants raise four issues for review. First, appellants argue that the lower court erred in not finding the prosecution of these cases barred by the statute of limitations. We agree with the lower court that prosecution of these cases was not barred.

Appellants argue that insofar as the last act of illegal dumping occurred in 1975, the statute of limitations on these charges ran out in 1977. The applicable statute of limitations, 18 Pa. C.S. § 108, provides under subsection (f)(1) that the limitations period, normally two years, is tolled "during any time when the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth. . ."[1] This standard was applied in *Commonwealth v. Stockard,* 489 Pa. 209, 413 A.2d 1088 (1980), in a case remarkably similar to the case at bar. Our Supreme Court held that the statute of limitations was tolled after a thorough search revealed that defendant had no legal residence or office

within the Commonwealth. Although we stop short of creating a per se rule, in the instant case appellant's absence from the Commonwealth from 1975 to 1980 certainly foiled all efforts to ascertain his whereabouts. Appellant's fleeting contacts with the Commonwealth such as hospital visits, visits with unspecified relatives, or driving a company truck to unspecified locations in eastern Pennsylvania do not comport with notions of a "reasonably ascertainable" place of abode or work.

Appellants also argue that 18 Pa. C.S. § 108(f)(1) violates the requirements of the Equal Protection and Privileges and Immunities Clauses of the United States Constitution. As to the Equal Protection Clause, appellants assert that the statute discriminates between residents of the Commonwealth and non-residents by creating two classes of people: residents, for whom a definite period of limitation is always applicable; and residents who are continuously absent from the Commonwealth and non-residents, for whom the period of limitation is extended. We disagree.

The right to travel freely has been guaranteed constitutional protection by the Supreme Courts of the United States and Pennsylvania. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Stotlemeyer v. Stotlemeyer,* 458 Pa. 503, 329 A.2d 892 (1974). Nevertheless, the right to travel is subject to qualification when it runs afoul of legitimate state interests . In *Jones v. Helms,* 452 U.S. 412 (1981), the United States Supreme Court upheld a Georgia child support statute which made it a misdemeanor to abandon a dependent child, but provided that it was a felony offense for a parent to abandon a dependent child and to leave the state. The Court reaffirmed that the right to travel is a fundamental interest protected by the Constitution and that. . ."a State may neither tax nor penalize a citizen for exercising his right

to leave one State and enter another." *Id.* at 419. Nevertheless, the Court recognized that there are situations in which the service of State interests permit the rationally related qualification of a citizen's right to travel, including the situation where a person commits a crime in a State, then leaves before arrest or conviction. *Id.* at 421-422.

> [T]here is clearly a distinction between one who . . . leaves the state after committing a crime, resulting in the tolling of the statute of limitations during his absence, and one who has committed no crime but is deprived of a government benefit merely because he exercises his right to travel to another state. In the former circumstance, the state has an interest in assuring that the defendant is available locally not only to enhance the possibility of detection but also to avoid the burdens of extradition proceedings, should he be charged, his whereabouts become known, and he refuses to return voluntarily.

Id. at 421, fn. 18, *quoting Scherling v. Superior Court of Santa Clara County,* 22 Cal.3d 493, 501, 585 P.2d 219, 223-224 (1978).

The tolling provision of the statute of limitations, 18 Pa. C.S. § 108(f)(1), is rationally related to the Commonwealth's interest in enhancing the possibility of identification of criminals and in avoiding the burdens of extradition proceedings. We find a further valid legislative purpose in the statute in that it enhances the possibility of the detection of crime, where, as here, the evidence of the crime may be well hidden.

We reject appellant's argument that the tolling provision of

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18 Pa. C.S. § 108 violates the Equal Protection Clause. That Clause establishes the fundamental principle that a State must govern impartially. *See Helms,* 452 U.S. at 423. Section 108(f)(1) applies equally to all criminal activity within the Commonwealth; nothing in appellants' argument or in the record suggests that the statute has been enforced against appellants any differently than it would be enforced against anyone else who engaged in the same conduct. *Id.* at 424.

Although not binding upon us, we find most persuasive the rationale of *Scherling v. Superior Court of Santa Clara County,* 22 Cal.3d 493, 585 P.2d 219 (1978). Addressing the same challenge to its statute of limitations tolling provision, that court held that the rational relationship test was applicable, since the statute did not violate the defendant's right to travel and did not deprive the defendant of a fundamental interest in liberty. *Id.* at 224-225. The tolling of Section 108 does not impose a penalty greater than that imposed upon criminals who remain in the state, but rather subjects those who choose to absent themselves to responsibility for a longer period of time. *See Scherling,* 22 Cal.3d at ____, 585 P.2d at 225.

We therefore measure appellants' equal protection claim by the less rigorous rational relationship standard applicable to rights which are not deemed to be fundamental. We have shown above that the Legislature could have determined that the detection of the crime, identification of the criminal and avoidance of extradition are more likely if the criminal remains in the state than if he departs. This assumption justifies tolling the statute of limitations for the period during which appellants may have avoided detection by leaving the jurisdiction.

As to appellants' argument under the Privileges and

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Immunities Clause, it is settled that the Clause is to be narrowly construed and does not require that a State must always apply all of its laws or provide all of its services equally to residents and non-residents who may request it to do so. *Hicklin v. Orbeck,* 437 U.S. 518 (1978); *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978). The Supreme Court has limited the Clause's applicability to privileges and immunities "bearing on the vitality of the Nation as a single entity." 436 U.S. at 363. Here, protection from prosecution for a crime for a specified period of time cannot be said to impact on the vitality of the Nation.

Appellants next argue that the lower court erred in finding no violation of due process resulting from the lapse of time between the criminal act and the indictment. We agree with the court below that appellants have been provided with the full protection of due process.

Appellants assert that during the time between the last illegal dumping, in 1975, and the filing of the indictment, in 1980, Marvin Lightman, Jerome Lightman's father, a material witness, passed away. It is settled that pre-arrest delay does not violate fundamental conceptions of justice except where the delay caused actual and substantial prejudice to the defendant and the government intentionally delayed prosecution solely to gain a tactical advantage over the defendant.[2] *Commonwealth v. Daniels,* 480 Pa. 340, 390 A.2d 172 (1978), quoting *United States v. Marion,* 404 U.S. 307 (1971). *Daniels* elaborated:

> The Court, however, rejected . . . [the] . . . claim "that due process bars prosecution whenever a defendant suffers prejudice as a result of pre-indictment delay." Instead, it held that an inquiry

> into the prosecutions reasons for the delay is not required until a claim of prejudice to the accused is made out. "[*Marion*] establishes only that proof of actual prejudice makes a due process claim concrete and ripe for adjudication, not that it makes the claim automatically valid. . . . *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim. . . ."

Daniels, 480 Pa. at ____, 390 A.2d at 179, quoting *United States v. Lovasco,* 431 U.S. 783, 789 (1977) (citation omitted).

We find that appellants have failed in their initial burden of showing that the delay worked a material prejudice to his defense. Even where a potential witness has died, as did Marvin Lightman, or otherwise become unavailable, actual prejudice will not be found unless a defendant clearly establishes the subject matter and actual content of the witness' testimony and shows that it would have been exculpatory. *United States v. Mays,* 549 F.2d 670 (9th Cir. 1977). Indeed, in *Lovasco* no prejudice was found despite the fact that two witnesses assertedly material to the defense had died during a pre-indictment delay.

In the instant case, appellants have produced no evidence that Marvin Lightman's testimony would have been exculpatory where the Commonwealth has only alleged that Jerome Lightman joined the conspiracy by participation. We are unwilling to speculate as to the content of Marvin Lightman's testimony. Appellants' unsupported claim that Marvin Lightman alone might have explained the circumstances surrounding the bribery and dumping activities is insufficient to show the substantial content of that explanation. Therefore, absent a threshold showing of

the content of that testimony, we need not consider whether the delay was intentionally caused by the Commonwealth.

Appellants next assert that the lower court erred in admitting evidence of the nature of the material illegally dumped within the context of a trial for bribery. We hold that the evidence was relevant and properly admitted. The admission or exclusion of evidence is a matter for the trial judge's discretion and will not be reversed absent an abuse of that discretion. *Commonwealth v. Hart,* 479 Pa. 84, 387 A.2d 845 (1978). Here, the evidence was probative and relevant since it shed light on the principal facts necessary to establish essential elements of the crimes of bribery and conspiracy involving the agreement to exercise discretion or violate a legal duty. *See Commonwealth v. Bellacchio,* 296 Pa. Super. 468, 442 A.2d 1147 (1982); *Commonwealth v. Story,* 476 Pa. 391, 383 A.2d 155 (1975).

Finally, appellants assert that the lower court erred in charging the jury that they must find that the City of Philadelphia owned the Fort Mifflin Landfill and that the Hawthorne Company was licensed to dump at the site. We hold that the lower court correctly delegated these questions of fact to the jury's consideration.

We must consider appellants' argument in light of the general effect of the charge as a whole. *Commonwealth v. Irwin,* 494 Pa. 277, 431 A.2d 257 (1981). Here, the trial court, in its charge, continually emphasized that the determination of facts was left exclusively to the jury. (N.T. 815, 816, 819, 820, 825, 827-828). The question of municipal ownership of the site, supported by testimony, was specifically left to the jury. (N.T. 815). The question of the existence of the Hawthorne Company's "license" was immaterial, presented solely for the purpose of comparison of Lightman Drum Company's activity at the landfill. (N.T.

827-828). *See Irwin, supra; Commonwealth v. Douglas,* 461 Pa. 749, 337 A.2d 860 (1975).

The judgments of sentence are affirmed.

SPAETH, P.J., Files a Concurring Opinion.

BECK, J. joins OLSZEWSKI, J. except as to the equal protection analysis, and on that point she joins SPAETH, P.J.

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FOOTNOTES:

1. 18 Pa. C.S. § 108(f)(1) has been repealed and replaced by 42 Pa. C.S. § 5554 (1976). The language of section 5554 is identical to its predecessor, therefore the result we reach today is valid under either legislation.

2. We note that appellants claim is not directed toward a denial of his Sixth Amendment right to a speedy trial after arrest. *See e.g., Barker v. Wingo,* 407 U.S. 514 (1972); *Commonwealth v. Hamilton,* 449 Pa. 297, 297 A.2d 127 (1972); *see also* Pa. R.Crim.P., Rule 1100, 42 Pa. C.S.

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IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01026 PHILA. 1982

COMMONWEALTH OF PENNSYLVANIA

v.

JEROME LIGHTMAN,

Appellant

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal No. 747-783 April Term 1980

IN THE SUPERIOR COURT OF PENNSYLVANIA

NO. 01027 PHILA. 1982

COMMONWEALTH OF PENNSYLVANIA

v.

LIGHTMAN DRUM COMPANY, INC.,

Appellant

Appeal from the Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Criminal No. 784-820 April Term, 1980

PANEL CASE

Appendix C

BEFORE: SPAETH, P.J., OLSZEWSKI and BECK, JJ.

CONCURRING OPINION BY SPAETH, P.J.:

I concur in the result reached by the majority and with much of what the majority says. I write separately only to state the equal protection analysis that I believe should be applied.

Appellant argues that 18 Pa. C.D. § 108(f), as applied to him, violates the equal protection clause in that the statute creates two classes to whom disparate treatment is afforded, residents and non-residents. Brief for Appellant at 12. Thus, he argues, the statute violates the fundamental mandate of the equal protection clause that the government may not treat similarly-situated citizens differently.

When an equal protection claim is made, the initial inquiry must be to determine the applicable standard of constitutional review. Appellant asserts that Pa. C.S. § 108(f)(1) infringes upon his right to travel. Brief for Appellant at 13. The Supreme Court of the United States and the Supreme Court of Pennsylvania have both held that the right to travel freely throughout the United States is "fundamental", and that statutes that impose durational residency requirements on the receipt of state benefits violate the right. *See Dunn v. Blumstein,* 405 U.S. 330 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Stotlemeyer v. Stotlemeyer,* 458 Pa. 503, 329 A.2d 618 (1969). In determining the constitutionality of governmental action that infringes a fundamental right, a court must inquire whether the action is necessary to promote a "compelling" governmental interest. *See Shapiro v. Thompson, supra* at 634. In practice, governmental activity will rarely withstand this strict scrutiny.

Here, however, we need not subject Pa. C.S. § 108(f) to strict scrutiny, for it does not violate the fundamental right to travel. In *Scherling v. Superior Court of Santa Clara County,* 22 Cal. 3d 493, 585 P.2d 219, 149 Cal. Rptr. 597, the Supreme Court of California faced a similar equal protection challenge to a tolling statute. It held that the appellant's right to travel was not infringed because he was not deprived of a benefit or subjected to greater penalty for leaving the state; rather, "he [was] faced with a tolled statutory period of limitations." *Id.,* at 502, 149 Cal. Rptr. at 602.

There is a further reason for finding that an elevated standard of constitutional review is not required here. The cases in which the Supreme Court has strictly scrutinized infringements of the fundamental right to travel all occurred in a civil context. *See e.g. Dunn v. Blumstein, supra* (durational residency requirements deprive new residents of medical benefits); *Shapiro v. Thompson, supra* (durational residency requirements deprive new residents of welfare benefits). As the Court noted in *Jones v. Helms,* 452 U.S. 412 (1981), there was a distinction between these cases and the case before it, which was a challenge to a Georgia criminal statute that graded offenses according to whether or not a defendant remained in the state. In the civil cases, the Court noted, the challenged statutes "imposed . . . burden[s] on the exercise of the right to travel by citizens whose right to travel had not been qualified in any way." By way of contrast, the Court found, "appellee's criminal conduct within the State of Georgia necessarily qualified his right thereafter freely to travel interstate." 452 U.S. at 421. Similarly, here, appellant's right to travel was qualified, if at all, not by an arbitrary distinction drawn by the government, but by his own criminal conduct, for which he must be amenable to prosecution by the Commonwealth for a fixed period of time.

Since appellant's fundamental right to travel was not infringed

by governmental action, we should review the constitutionality of Pa. C.S. § 108(f) by applying the "rational relationship" test. This test requires a court to inquire whether it can conceive of a way in which the legislature might have deemed the challenged action to have been rationally related to the accomplishment of a legitimate government end. *See McGowan v. Maryland,* 366 U.S. 420 (1961). Applying this test, I find that the purpose served by 18 Pa. C.S. § 108(f) is clearly legitimate: it is to aid the Commonwealth's exercise of its traditional police powers of crime prevention, detection and prosecution by extending the period during which a suspected criminal is subject to a state's power to prosecute. Similarly, I have no trouble in concluding that the legislature could rationally have conceived that the statutory classification made by the tolling provision (residents and non-residents) would further this purpose. As the Supreme Court of California noted when analyzing a similar statute, "the Legislature could have determined that the detection of the crime and identification of the criminal are more likely if the criminal remains in the state than if he departs." *Scherling v. Superior Court of Santa Clara County, supra* at 503, 149 Cal. Rptr. at 603. For these reasons, I agree with the majority's conclusion that appellant's equal protection challenge must be rejected.

BECK, J., joins as to the equal protection analysis.

APPENDIX D—DECISION OF GAFNI, J. DATED DECEMBER 21, 1981

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

APRIL SESSIONS, 1980

NOS. 747, 748, 749-783

COMMONWEALTH OF PENNSYLVANIA

v.

JEROME LIGHTMAN

APRIL SESSIONS, 1980

NOS. 784, 785, 886-820

COMMONWEALTH OF PENNSYLVANIA

v.

LIGHTMAN DRUM CO.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon consideration of the testimony adduced at a hearing of defendant's Amended Motion to Quash Information, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Defendants are charged with violating 18 Pa. C.S.A.

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§ 4701 (Bribery); 18 Pa. C.S.A. § 903 (Conspiracy); 18 Pa. C.S.A. § 911 (Corrupt Organizations).

2. On March 28, 1980, Findings and Order and Presentment of the County Investigating Grand Jury were issued against Jerome Lightman and Lightman Drum Co. (N.T. 8).

3. Jerome Lightman was arrested, and criminal complaints were filed against Lightman Drum Co. and Jerome Lightman on March 28, 1980 (N.T. 9).

4. The Commonwealth and defendants entered into a stipulation through their counsel that:

> (a) Between April, 1974, and the present, Jerome Lightman has resided in the State of New Jersey and has no residence in the Commonwealth of Pennsylvania (N.T. 6).
>
> (b) Between April, 1974, and the present, Jerome Lightman was employed by Lightman Drum Co. which maintained an office in Berlin, New Jersey, which office has been his principal place of work. Between April, 1974, and the present, Jerome Lightman has not maintained an office in the Commonwealth of Pennsylvania (N.T. 6).
>
> (c) Between April, 1974, and the present, Lightman Drum Co. has resided and its sole office or facility has been located in Berlin, New Jersey, and that between April, 1974, and the present Lightman Drum Co. has not maintained an office facility in Pennsylvania (N.T. 7).

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5. Sometime in January, 1979, Detective James Hoyle of the Philadelphia District Attorney's Office was assigned to the investigation of bribery of city officials and illegal dumping of waste materials at the Fort Mifflin Landfill (N.T. 9, 10).

6. On February 14, 1978, as a result of an interview conducted with a Mr. Frank Pertnoy, an employee of the Jonas Waste Removal Company, the District Attorney's Office discovered that city employees working at the Fort Mifflin Landfill had been bribed (N.T. 10).

7. Prior to that date, the District Attorney's Office had information from a Mr. Thomas Healey, who is employed as a chemical engineer with the Philadelphia Water Department, that numerous drums containing toxic chemical waste material had been unearthed at the site (N.T. 11).

8. Mr. Healey suspected that the companies involved were Lightman Waste Removal Company, ADM Waste Removal Company and Jonas Waste Removal, Inc. He did not at that time know whether there had been any bribery by any of these companies (N.T. 11, 31).

9. On December 14, 1975, Leonard Qualtiere, area supervisor for the Philadelphia Streets Department, observed a tractor-trailer dumping 55 gallon cans of poisonous and toxic solvent and paint on the Fort Mifflin Dump. The material being dumped was unauthorized material that an employee had permitted to be dumped. The employee was suspended (N.T. 42).

10. Mr. Qualtiere had received numerous complaints of unauthorized material being dumped at the site and visited the site pursuant to complaints. When he discovered the truck which

was dumping the waste, he had the driver, who was not a city employee, arrested (N.T. 44, 45).

11. Mr. Qualtiere could not recall whether there were any signs indicating to what company the tractor-trailer belonged and did not ask the driver for which company he worked (N.T. 45).

12. Mr. Qualtiere received complaints of illegal dumping at the site for almost two years prior to 1975 but it was only on December 14, 1975, that he actually caught someone dumping (N.T. 46, 48).

13. On the date that Mr. Qualtiere first observed the truck dumping on the site, he did not know as a fact that the employees working there were being bribed (N.T. 49).

14. On the date of the incident there was a fence around the dump and only one entrance. The rest of the entrances were sealed and closed (N.T. 52).

15. On February 28, 1979, as a result of statements of Calvin Carson, who was employed as a guard at the site during the time of the illegal dumping, it was determined that the Lightman Drum Co. was dumping chemical wastes at the site and that Carson and Clarence Walker were receiving money in the form of checks from Lightman Drum Co. and others, as bribes (N.T. 13, 14).

16. Mr. Carson was not immediately arrested and a further investigation to determine his reliability was commenced on the same date, when the investigation was submitted to the Grand Jury (N.T. 13, 14).

17. Although the case was submitted to the Grand Jury,

charges were not immediately brought against Jerome Lightman or Lightman Drum Co. because various records were needed to locate employees of the company so as to serve them with subpoenas to come before the Grand Jury. This evidence was needed to corroborate Mr. Carson's statements (N.T. 16, 17).

18. A grand jury subpoena was issued on March 22, 1979, for the business records of Lightman Drum Co. Counsel for the parties stipulated that some records were produced on March 22, 1979, including the cancelled business and payroll checks from 1974, 1975, 1976, and possibly 1977. On May 17, 1979, the Lightman Drum Co. produced cancelled checks and receipt books for 1972 and 1973 (N.T. 17, 18, 37). A significant number of the more than 100 checks were for the period 1974-1977.

19. Counsel further stipulated that the review process of these records started within the first week after they were turned over so that if the checks were turned over on March 22, 1979, the District Attorney knew or had constructive knowledge of checks written bearing the signature of Jerome Lightman and Marvin Lightman payable to Clarence Walker and that the review process of finding all these checks continued thereafter (N.T. 37-39).

20. The records produced by Lightman Drum Co. were contained in three or four 20" x 10" cartons, each approximately 16 inches high. During the time that Detective Hoyle was examining these records, he was also examining fifteen to twenty boxes of records produced by the other companies involved (N.T. 19, 20).

21. After the records were examined, names of the employees of Lightman Drum Co. were determined and Grand Jury subpoenas were issued for them. Most were residents of New Jersey and as many had relocated, it was difficult to produce them as witnesses (N.T. 20).

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22. Some of these witnesses were presented before the Grand Jury during June or July, 1979 (N.T. 21).

23. Jerome Lightman appeared before the Grand Jury in September, 1979, and at that time handwriting exemplars were obtained from him and submitted to the Philadelphia Police Department, Documents Unit. The Unit was asked to compare the exemplars with the checks that were made out to a city employee. (N.T. 21, 22).

24. The results of this examination were received by the District Attorney's Office on October 25, 1979. Following this date, the District Attorney's Office received information from the lawyer for Jerome Lightman indicating his belief that the statute of limitations had run and that it would be raised as a defense (N.T. 22).

25. In November, 1979, the District Attorney's Office instituted an investigation with regard to residency problems and the statute of limitations. Letters were sent to governmental agencies and interstate subpoenas were issued again to employees of Mr. Lightman to aid in the determination of the problem of the statute of limitations. The investigation continued through February, 1980 (N.T. 22, 23).

26. The parties further stipulated that Assistant District Attorney David Michelman would testify that in relation to the presentment issued by the Grand Jury against the defendants, the drafting and internal review of that presentment by the District Attorney's Office began in early March, 1980, and continued until the presentment was submitted to the Grand Jury on March 27, 1980 (N.T. 40).

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27. Jerome Lightman first became associated with the Lightman Drum Co. in July, 1970, at which time his father, Marvin Lightman owned the company. The company was not incorporated and its offices were in Marvin Lightman's house in Philadelphia. The business was incorporated in 1972 with Marvin Lightman as president (N.T. 55, 56).

28. The offices of the corporation were moved to an office trailer on Main Street in Manayunk, Philadelphia, until 1974. In 1974 the office was moved to Berlin, New Jersey, and in the spring of 1974 Jerome Lightman moved to Marlton, New Jersey, and became a New Jersey resident (N.T. 57).

29. In 1977, after the corporation moved to New Jersey, a WAlnut 2 number, which is a center city Philadelphia number, was assigned to the corporation. Since 1974, the company has been listed in the Philadelphia metropolitan telephone book with a New Jersey address (N.T. 61, 62, 67).

30. Lightman Drum Co. does more than 50% of its business in Pennsylvania. The corporation has 25 different customers in Pennsylvania, mostly in Philadelphia. The corporation also has fuel stickers from the Commonwealth of Pennsylvania and turnpike hazardous waste hauler's permits (N.T. 65, 66).

31. In 1970, Jerome Lightman was employed as a truck driver for Lightman Drum Co. and continued as a truck driver until Marvin Lightman became sick in the beginning of 1978. Until that time, Marvin Lightman had been responsible for all management and business decisions (N.T. 55, 56, 76, 77).

32. Marvin Lightman died in September, 1978 (N.T. 63).

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33. After Lightman Drum Co. and Jerome Lightman had moved to New Jersey, through 1977, Jerome Lightman would drive a company truck into Philadelphia and eastern Pennsylvania everyday (N.T. 58, 70-74, 77).

34. The trucks driven by Jerome Lightman had the name "Lightman Drum Company" in bold face printing in red on a white background. The corporation owned four tractors and each had this lettering on it. In 1975 the name "Lightman Drum Company" was on every tractor and on most of the trailers owned by the corporation (N.T. 58-60, 85).

35. Jerome Lightman continued to drive a Lightman Drum Co. truck on a regular basis through 1977, and afterwards, would drive a truck on an irregular basis in an emergency or for certain customers. Commencing in 1978, he drove a private unmarked car on business in Pennsylvania two to four times a week for the purpose of meeting drivers, soliciting business, and attending the Delaware Valley Drum Association monthly meetings (N.T. 61, 66, 67, 73, 77, 78, 81-83).

36. Jerome Lightman's telephone number is listed in the Cherry Hill, New Jersey phone book, as was Marvin Lightman's (N.T. 63).

37. Since 1977, Jerome Lightman's contacts with Philadelphia included visiting his father many times when he was hospitalized at the University of Pennsylvania. He also visited his daughter when she was operated on at Children's Hospital, and his wife's sister's and mother's families, all of whom live in Philadelphia (N.T. 64).

38. Defendants had no reasonably ascertainable place of

abode or work within the Commonwealth between December, 1975, and March, 1980.

Conclusions of Law

1. The charges filed against the defendants were timely under 18 Pa. C.S.A. § 108(f), the statute of limitations, because the defendants had no reasonably ascertainable place of abode or work within the Commonwealth, *Commonwealth v. Stockard,* 489 Pa. 209, 413 A.2d 1088 (1980), and, accordingly, the statute of limitations was tolled between December, 1975, and March, 1980.

2. The proviso to the statute of limitations set forth in 18 Pa. C.S.A. § 108(f)(1) does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Scherling v. Superior Court,* 22 Ca. 2d 493, 149 Cal. Rptr. 597, 585 P.2d 219 (1978).

a. The classification made under the statute differentiating residents from non-residents, does not involve a "suspect classification" or fundamental rights which would necessitate the "compelling state interest" test. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *Stotlemeyer v. Stotlemeyer,* 458 Pa. 503, 329 A.2d 892 (1974).

b. Under the "rational relationship" test the classification made between residents and non-residents and concealed residents bears a rational relationship between the ends sought to be served and the means by which they are accomplished, thus fulfilling the requirements of the Equal Protection Clause. *Reed v. Reed,* 404 U.S. 71, 76 (1971); *McDonald v. Board of Education,* 394 U.S. 802, 809 (1969); *Commonwealth v. Turner,* 176 Pa. Superior Ct. 32, 37 107 A.2d 136 (1954).

Appendix D

3. The statute does not violate the Privileges and Immunities Clause of Article 4, Section 2, of the United States Constitution because the privilege at issue here—protection from prosecution for a crime after a specified period of time—does not bear upon the vitality of the nation as a single entity. *Baldwin v. Montana Fish and Game Commission,* 436 U.S. 371 (1978); *Hicklin v. Orbeck,* 437 U.S. 518 (1978).

4. Although the tolling provision of the statute of limitations is subject to the requirements of due process of law, the facts instantly show that defendant's due process rights have not been violated by any pre-arrest delay. The pre-arrest delay did not actually and substantially prejudice the defendants and the Commonwealth did not delay prosecution solely to gain a tactical advantage over the defendants. See paragraphs 5 to 26, *supra, United States v. Lovasco,* 431 U.S. 783, 789 (1977); *Marion v. United States,* 404 U.S. 307, 317 (1971). *Commonwealth v. Grey,* ____ Pa. Superior Ct. ____, ____ A.2d (Slip opinion filed 11/30/81, No. 899 Philadelphia, 1980); *See Commonwealth v. Daniels,* 480 Pa. 340, 390 A.2d 172 (1978).

s/ Gafni
GAFNI, J.

12/21/81

APPENDIX E—OPINION AND ORDER DATED NOVEMBER 18, 1981

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

NOS. 747-820

APRIL TERM, 1980

COMMONWEALTH OF PENNSYLVANIA

vs.

JEROME LIGHTMAN AND
LIGHTMAN DRUM COMPANY

O P I N I O N

Carson, Jr., J.

The corporate defendant, Lightman Drum Company, and Jerome Lightman, the individual defendant, were each separately indicted, in one bill of information, charged with conspiracy, #784-747 respectively, corrupt organization, #485-478 respectively, and #749-783 inclusively, and #786-820 inclusively, charging bribery. The charge of corrupt organization was withdrawn from the jury's consideration by the attorney for the Commonwealth.

The jury returned a guilty verdict on all the remaining bills and post-verdict motions were filed. However, subsequent to filing of said motions, defendant questioned the transcription in the Court's charge to the jury. The defendant's objection was based

upon the erroneous transcription of the phrases "known legal duty" and "non-legal duty". After conference with the official court reporter, this objection was withdrawn by letter dated September 7, 1981 (see appendix "a"[1]). Post-verdict motions were thereafter heard, dismissed and sentence imposed. This appeal was taken from the judgment of sentence.

Defendants raise, in their Statement of Matters Complained of, the identical eight matters raised in their post-verdict motions. The first two assignments pertain to pre-trial motions heard by the Calendar Judge, the Honorable Abraham J. Gafni, wherein defendant sought dismissal of the proceedings on the ground that the prosecution was barred by the Statute of Limitations and prejudice occasioned by pre-indictment delay.

The Calendar Judge made extensive findings of fact and conclusions of law in justifying dismissal of the said motions.[2] The trial judge has reviewed the record of the hearing before Judge Gafni and finds there is substantial support in the record for his findings upon which he predicated his conclusions of law. Briefly, Judge Gafni found that the prosecution grew out of the Grand Jury investigation into illegal dumping in the Fort Mifflin landfill, located in Philadelphia. As a result of this investigation, a city employee, on or about February 26, 1979, confessed that as a result of payments of money made on behalf of the corporate defendant and by the individual defendant, defendant was permitted to dump chemical waste on this city -owned property on divers dates from September 27, 1972, through, to and including December, 1975. It was stipulated that at all relevant times, the individual defendant was employed solely by, and was a stockholder in the corporate defendant. It was further agreed that during this period, the individual and corporate defendants were residents of New Jersey, and did not maintain a business office

nor residence in the Commonwealth of Pennsylvania.

Judge Gafni very properly concluded that the Commonwealth had proven that the statute of limitation had been tolled by defendant's absence from the jurisdiction.[3] Commonwealth vs. Stockard, 413 A2nd 1088, 1092 (1980). The defendant asserts that a literal application of the statute violates his right to equal protection, since non-residents are accorded disparate treatment as compared with residents. Despite this assertion, defendant concedes, in his brief filed on October 20, 1980, that the proper measure of defendant's equal protection claim should be gauged by the rational relationship standard applicable to rights deemed not to be fundamental in nature. Justice Mosk of the California Supreme Court stated, in Scherling vs. The Supreme Court of Santa Clara, 149 Cal. Reporter 597, 602 (1978);

> "The state has an interest in assuring that one who committed a crime remain in the jurisdiction to enhance detection of the crime or identification of the criminal".

This interest justifies the classification - resident and non-resident - and has a rational relationship to a valid governmental function, especially since it does not impose a greater penalty upon the non-resident nor does it discriminate based on a suspect classification of race or sex, but merely lengthen the period of responsibility commensurate with the period of absence.

The appellant next contends that since he was legally incapable of being convicted of conspiracy, statements made by Clarence Walker and Calvin Carson during the course of an alleged conspiracy were inadmissible at his trial. He reasons that the prosecution's evidence establishes, if anything, a completed bribery

which necessarily requires acting in concert between the giver and taker of the bribe, and precludes his conviction. Counsel seeks support for his argument on "Wharton's Rule", which holds that an agreement between two persons to commit a crime cannot be prosecuted as conspiracy when the crime necessarily requires the participation of two persons for its commission. The Commonwealth's position in opposition to appellant's stance is grounded on Judge Hester's opinion, in Commonwealth v. Bucci, 423 A2nd 747 (1980), in which, speaking for the panel, Judge Hester stated, on page 748 as follows:

> "In Pennsylvania, we have never followed "Wharton's Rule". Clearly, conspiracy does not merge with the substantive offense (cases cited)
>
> The rationale for this is that our Courts have considered that a partnership in crime presents a greater potential threat to the public than individual behavior".

The credible evidence was to the effect that Clarence Walker, an employee in the sanitation department of the City of Philadelphia, was assigned to the city-owned Fort Mifflin landfill. At the time of his assignment as a bulldozer operator, Mr. Walker was the sole employee stationed on the site. At the time of his assignment, Mr. Walker was directed by his superiors to prevent all dumping on the site, except for city-owned vehicles, and those of Hawthorne Corporation. As a bulldozer operator, it was also his function to level the ash residue which was transported from the city owned incinerators by Hawthorne Corporation trucks and city vehicles. This witness testified that shortly after this assignment, but sometime prior to employment of Calvin Carson, as the second employee, he and Michael Lightman, father of the

appellant and principal stockholder of corporate-defendant, entered into an agreement whereby trucks of the corporate-appellant would be permitted to dump their liquid waste on the landfill at an agreed upon price per barrel. On a subsequent occasion, approximately six to eight months after the initial agreement, two Lightman trucks were driven on the dump in accordance with the agreement, one by Michael Lightman, the other by appellant, who was introduced to Mr. Walker by the elder Lightman as his son, Jerry. Thereafter, Mr. Walker testified that he received payoffs for dumping at the home of the appellant, Jerome Lightman, and that all of the checks representing bribe payments were drafted, signed and drawn on the account of appellant, Jerome Lightman.

Calvin Carson testified that he was an employee of the sanitation department of the City of Philadelphia. He stated that in the late spring of 1972, he was assigned to the Fort Mifflin landfill as a watchman. At the time of his assignment, he was specially directed to prevent all unauthorized vehicles from entering the site. He stated that when he started this assignment, that the only other employee on the landfill was the bulldozer operator, Clarence Walker. He further testified that in May, 1972, when a truck of the Lightman Company came on the landfill which he knew to be unauthorized, he was told by Clarence Walker to let it through. After the truck dumped on the site, Mr. Carson was informed by Clarence Walker to permit dumping and the terms of that agreement, to wit, $1.25 per barrel. Mr. Walker proposed, and the witness accepted, equal division of the illegal payments from the Lightman Company. He further testified that during the relevant times, the appellant, Jerome Lightman, drove the Lightman trucks on the landfill, and emptied barrels containing liquid waste on the landfill, which were covered by the bulldozer operator. He further corroborated the receipt of checks from the

appellant and other drivers of Lightman Company, and the cashing of same at Girard Bank by Clarence Walker, whom he had to drive to the bank.

The Pennsylvania Crimes Code, in Chapter 47, Sec. 4701(a)(3) provides:

> "(a) A person is guilty of bribery . . . if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another;
>
> (3) Any benefit as consideration for a violation of a known legal duty as public servant or party official".

Clearly, the Code includes in its definition the classic definition of conspiracy. On the other hand, bribery is defined as the unilateral conduct of the actor. The plain meaning of this provision defines bribery not only in terms of an attempt (offers), but equally as appellant argues a completed offense, i.e., concerted acts of both the giver and taker (accepts), and conspiracy (or agrees to accept from another). The testimony in this case did support all three of the above provisions. Appellant's argument would be meritorious were it directed to the imposition of criminal sanction, however, that is not his argument. His argument is that the wrongdoer is shielded from the consequences that flow from his unlawful combination, to wit, admission in evidence of acts and conduct in furtherance of the conspiracy. The evidentiary rules permitting this evidence does not depend on labeling, rather on the content and character of the illegal activity. Hence, the testimony of Calvin Carson and Clarence Walker, party to the unlawful combination was admissible, since it was in furtherance of the unlawful agreement between Michael Lightman, and

Clarence Walker, which was joined by appellant, Jerome Lightman and Calvin Carson.

The appellant complains of the Court's charge relative to the ownership of the landfill as being in error, in view of the lack of evidence establishing this element.[4] Both of the city employees, in their testimony, identified the landfill and stated its ownership and/or possession by the City of Philadelphia (R.93-100; 219-224; 234-235; 243-244). This evidence was more persuasive than the testimony which the Superior Court concluded was more than sufficient to establish the element of reasonable doubt in Commonwealth vs. Spann, 228 Pa. Superior Ct., 192 (1974).[5]

Appellant is equally mistaken when he avers that the Court charged the jury that the landfill was city-owned. In fact, the Court posed this element as a matter of their factual resolution. In fact, the jury was instructed by the Court in this regard, on page 815, as follows:

> "Now, Members of the Jury, in *order to do that,* you have got to find first that the landfill was owned by the City of Philadelphia. You have got to consider all of the evidence you have heard pertaining to that. It is my recollection that it came out in the testimony of Walker and Carson and maybe other witnesses. *Now, I told you before, don't look to me to determine what the facts are here, that's for you.* Have you been persuaded beyond a reasonable doubt that this landfill commonly referred to as Fort Mifflin, was city owned, one: two, was Carson and Walker employed by the City of Philadelphia; three, was

> it their duty, known duty, to prevent dumping on this landfill; four, did Lightman Drum enter into an agreement to confer a benefit or did confer a benefit on these two agents to permit dumping on the landfill. If you find that and believe all of those beyond a reasonable doubt, your verdict would be guilty, certainly as to Lightman Drum Company".
>
> "Now, if you have a reasonable doubt as to any aspect of that, your verdict should be not guilty".

In this same vein, in summarizing the factual issues to be resolved by them, the Court instructed the jury, on pages 827-828, as follows:

> "Let's go ovear this once again, members of the jury . . In order to convict the corporation of bribery, you have to find that there was a high managerial agent or officer, president of the corporation is in that position, who used or offered or tendered a benefit to a public servant to get him to violate a nonlegal duty. In order to do that, you have to find, as I said before that this landfill was owned by the City of Philadelphia, that Walker and Carson were employees of the City of Philadelphia, and it was their duty to prevent persons, private persons, private in the sense that Lightman was, from dumping".

Clearly, the Court left to the jury, as it should have, the exclusive responsibility of deciding the question of the possession or ownership of the Fort Mifflin landfill.

Appendix E

Similarly, the appellant complains that the Court charged the jury that Hawthorne was licensed by the city to come on the landfill and that appellants were not, despite the lack of evidence to establish either.[6] The language to which appellant complains was stated in the Court's instructions, on pages 827-828, as follows:

> "Now, of course, Hawthorne, while he was private, was licensed by the city to go on that dump, but Lightman Drum wasn't. If you find that to be so, and you believe that evidence beyond a reasonable doubt, Lightman Drum is guilty, even though it's a corporation".

There was voluminous testimony by the two city employees who stated that it was their special duty in being assigned to the landfill to prevent unauthorized entry of vehicles on that dump. The two city employees testified that they were specially instructed to prevent unauthorized entry on the landfill, that the only private vehicles authorized were those of the Hawthorne Corporation who was under contract with the city to haul ash residue from the city owned incinerators to the landfill (R. 222-223; 356-357; 135-136; 180-181). Clearly, the jury understood that the determination of the facts were in their exclusive jurisdiction, being told so repeatedly by the Court in its introductory remarks, and final instructions.

Lastly, appellant complains that the Commonwealth's attorney violated Rule 305 of Pennsylvania Rules of Criminal Procedure,[7] in that he failed to turn over reports of polygraph tests of Clarence Walker and Leonard Qualtieri.[8] The question was raised eleven months after trial and three months after denial of post-verdict motions, in appellant's Petition and Rule to Allow Additional Discovery.[9] At the hearing on the petition, appellant

withdrew his motions regarding Leonard Qualtieri, in view of the fact that while Mr. Qualtieri's name was mentioned at the trial, neither side called him as a witness (R. 2 - 23 - 82 - 12).

The Court entertained considerable doubts that the rule required reports of polygraph examination of co-conspirators be disclosed, and that 305-D(e) could be extended to require any more than that the reports of defendant's polygraph examination be made available to his counsel. In any event, the appellant admits that reports of polygraph examinations of March 22nd were given to counsel, and that it was only the reports of June 5, 1980 which was made available the day prior to this hearing.[10] The nature of these earlier examinations pertains to payoffs to a supervisor in the sanitation department by the witness to allow him to permit dumping on the landfill, and on the latter examinations the subject matter was payoffs to a supervisor by the witness to allow overtime work.[11] The voluntary complicity of the two witnesses for the Commonwealth in the conspiracy and bribery was freely admitted, and trial counsel brought out on cross-examination their convictions as participants in the criminal enterprise. The bargains made with the prosecution to secure their testimony was revealed, and their rather favorable sentences was put in evidence. Counsel ventured only that this information would have aided impeachment of the witnesses, but the trial judge indicated that the fact of their complicity in these crimes was fully developed at trial, and moreover the introduction of polygraph reports would have been prohibited under any circumstances.

For the foregoing reasons, it is respectfully submitted that the Post-Verdict Motions were properly denied.

s/ Curtis C. Carson, Jr.

Appendix E

FOOTNOTES

1. See attached photocopy of letter dated September 7, 1981, signed by Herman Bloom, Esquire.

2. Appendix 10—Quarter Session File

3. 18 P.C.P.S. 108(f);

> "The period of limitation does not run; (1) during any time where the accused is continuously absent from this Commonwealth or has no reasonably ascertainable place of abode or work within this Commonwealth".

4. Statement of Matters Complained of on Appeal:

> "There was insufficient evidence to establish the duties of Calvin Carson and Clarence Walker within the meaning of the Pennsylvania Bribery statute".

5. Commonwealth vs. Spann at pg. 194, the Court stated:

> "We are convinced that the Commonwealth has established that the warehouse was owned by someone other than the appellant. A security guard who testified for the Commonwealth, although he had not seen the deed and had not known who owned the warehouse prior to April 20, 1973 (date of incident), he subsequently learn that the building was owned by the Redevelopment Authority and that part of his duties was to check the building

several times a week. The arresting officer also testified that the building was owned by the Redevelopment Authority. This testimony was properly admitted and constituted sufficient evidence of ownership".

6. (5) The trial court erred in charging the jury that the premises in question was owned by the City of Philadelphia when there was no evidence to establish that it was city-owned property.

7. Rule 305 B. - Disclosure by the Commonwealth

(1) Mandatory -

In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(e) results or reports of scientific tests, expert opinions, and written or recorded reports of *polygraph* examinations or other physical or mental examinations of the defendant, which are within the possession or control of the attorney for the Commonwealth;

8. See Appendix B - Rule to Show Cause

Appendix E

9. See Appendix B and C - Memorandum in Support of Defendant's Petition to Allow Additional Discovery

10. R.-2-23-82 - Ps. 13-14-15

11. See Appendix C-3 - 4

Appendix E

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

APRIL TERM, 1980

NOS. 747-783, 784-820

COMMONWEALTH OF PENNSYLVANIA

vs.

JEROME LIGHTMAN and LIGHTMAN DRUM COMPANY

ORDER

AND NOW, to wit, this 18th day of November, 1981, after hearing duly held, Defendant's Motions in Arrest of Judgment and for a New Trial are hereby denied.

The Clerk of Quarter Sessions is directed to order a Pre-sentence Investigation. Counsel for defendant and the Assistant District Attorney are hereby ordered to appear before this Court on Tuesday, December 15, 1981, at 9:30 a.m., in Courtroom 416 City Hall, for a status hearing.

By the Court:

s/ Curtis C. Carson, Jr.
J.